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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
Petitioner,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

C. Carter Lee,
Rocky Mount, Virginia,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
Petitioner (Appellant),

v.

UNITED STATES,
Respondent (Appellee)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Otis Mason Martin, Claimant and Appellant respectfully shows:

Summary of Matter Involved

This is an action at law, wherein the Government filed a libel against one Ford Coupe Automobile, Motor No. 18-5497068, owned by Appellant, praying forfeiture under Section 3321 and 3720, United States Code, in that said automobile was unlawfully used in the transportation and concealment of untaxed distilled spirits.

Appellant claims that the automobile was seized as the result of an unreasonable search and the search was violative of the Fourth Amendment of the Constitution of the United States, and in contravention of Rule 41 of Federal Rules of Criminal Procedure. A timely motion was made for the suppression of the evidence obtained by reason of said search for the reason that said seizure was made by an unreasonable entry and search of the garage of appellant, which garage was adjacent to and within the curtilage of appellant's home, and the said entry, search, and seizure having been made in the night time without a search warrant, without a warrant for arrest, and without permission of entry by appellant, or request for admission by the officer making the search; although Otis Mason Martin was present at the time and known to be the owner of the premises, and the automobile and contents, no arrest was made. The searching officer, however, did tell appellant to appear in Court on the following day to which appellant agreed. The search and seizure was not made as an incident to any valid arrest, since an arrest was not made.

Otis Mason Martin, was, on July 7, 1947, upon a plea of guilty, placed on probation for three years by the United States District Court for the Western District of Virginia, under the supervision of Probation Officer Willard N. Fansler, who made the search on January 20, 1950, at from 5:45 at 6:00 A. M. while it was night time, which resulted in the seizure of the automobile and contents thereof.

The dwelling of appellant was about one-half mile outside of the City of Roanoke, Virginia, upon a rectangular lot, the garage being about 60 feet back of and slightly to one side of the house, with the driveway extending from the roadway in front of the house and along side of same to the garage.

By agreement in open court, it was stipulated that the evidence before the trial court on the 27th day of February, 1950, upon the hearing of the revocation of the probation of Otis Mason Martin, as well as the motion to suppress the evidence should be considered as all the evidence in this case. Trial by jury was waived.

The motion to suppress the evidence was informally passed upon by the Trial Court on the 27th day of February, 1950, and was denied, to which appellant excepted, and thereafter filed his answer denying the right of forfeiture. The Trial Court had theretofore revoked the probation of appellant, and imposed a sentence upon Martin of two years confinement in prison and a fine of $250.00.

From the conclusions of law of the Court below (District) the court said:

> "I deem it unnecessary to give any consideration to, or state any conclusion of law as to, the legality of Officer Fansler's search and seizure, had Otis Martin not been on probation. Inasmuch as Otis Martin was on probation and Officer Fansler was specifically charged with his supervision, I conclude as a matter of law that, under the circumstances set out in my findings of fact, Officer Fansler, in the discharge of his duty of supervising Probationer Otis Martin, was not required to first obtain a search warrant before entering the premises of Otis Martin and searching his garage. I therefore conclude that the motion of claimant, Otis Martin, to suppress the evidence of Officer Fansler, must be overruled." (R. p. 4.)

Upon appeal from the District Court to the United States Circuit Court of Appeals, the Court said ". . . The amendment applied in this case to Martin, a probationer, and to his garage located near his home, although his status is a circumstance to be taken into consideration; . . ."

Appellant contends that if the search had been made in the instant case by any person other than a probation

officer, and/or that if the party searched had been other than a person on probation that the said search would have been held to be unreasonable, and the evidence suppressed, the contention of appellant being that neither the fact that the officer making the search was a probation officer, nor the fact that Martin was a probationer should contravene the constitutional rights of appellant in defense of the forfeiture or in defense of a new crime uncovered as the result of said search.

No question is raised as to the authority of the Trial Court to revoke the probation; and, admittedly, the automobile was subject to forfeiture if the evidence obtained as a result of the search is legal.

Upon appeal from the District Court to the Circuit Court of Appeals, the judgment of the District Court was affirmed on the 24th day of July, 1950, whereupon the appellant applied for a rehearing which was denied the 6th day of September, 1950.

Opinion

The finding of facts and conclusions of law of the Trial Court is set forth in R. p. 1. The opinion of the Circuit Court of Appeals is set forth in R. p. 30.

Question Involved

The question involved herein is whether the search and seizure made by the United States Probation Officer Fansler of the garage of appellant on the 20th day of January, 1950, at from 5:45 to 6:00 A. M. was reasonable or unreasonable under the circumstances.

Basis of Jurisdiction

This court has the authority to review the judgment of the United States Circuit Court of Appeals. The question involved is purely a federal one. An appeal from the judg-

ment of the United States District Court to the United States Court of Appeals was taken within the time prescribed and this application for a Writ of Certiorari is being made within the time limit.

Reasons Relied upon for Allowance of Writ

Appellant says that the specific question involved in the instant case as applied to the facts herein, has not heretofore been construed by the Courts. Hence the case at bar presents questions which are largely of first impressions, i. e., as to the authority of a Probation Officer to make a search and seizure within the building of a Probationer, without either a warrant of arrest or warrant for search and seizure; and which search and seizure was made in the night time and without the arrest of the owner of the property seized by reason of said search, who was present at the time, and known by the officer making the search to be the owner of the property so seized as a result of said search.

It would also appear that from the decision of the Court below (District) that consideration was given by the Court to the fact that the search was made by a Probation Officer and the premises searched belonged to a Probationer, and this fact was given material consideration to the prejudice of appellant; and that consideration was also given to this fact by the United States Circuit Court of Appeals to the prejudice of appellant, the court, holding in effect that by reason of the fact that the search was made by a probation officer upon the premises of a probationer was a circumstance justifying the search.

The question here is one of substance with respect to the construction of the Fourth Amendment of the Constitution of the United States and likewise involves the application of Rule 41 (c) of the Federal Rules of Criminal Procedure with respect to searches and seizures made in the night

time, and this application for Writ of Certiorari is made in accordance of Rule 33 of the Supreme Court Rules as amended. The question here involved, as applied to the facts herein, has not been, but should be settled by this Court.

Failure to settle this question will probably engender much disputation and lack of uniformity amongst enforcement officers with respect to the limitations and operation of future acts of enforcement officials with respect to searches and seizures; and raises the question as to whether a probation officer is empowered with superior authority over that of other enforcement officers, and whether the rights of a probationer are circumscribed under the provisions of the Fourth Amendment.

Definitive construction by the Supreme Court of the Fourth Amendment of the Constitution, as well as that of Section 41 (c) of Federal Rules of Criminal Procedure, as applied to the circumstances of the instant case would prove most helpful and promote certainty and uniformity in the future conduct of enforcement officials with respect to searches and seizures.

And petitioner says that the Court below, in the instant case, has decided a federal question in a way probably in conflict with applicable decisions of this Court, and/or has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals of the Fourth District, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the case numbered and entitled on its docket as No. 6109, Otis Mason Martin, Appellant

v. United States, Appellee, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals of the Fourth District be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated October 12, 1950.

OTIS MASON MARTIN,
By —— ——,
Counsel for Petitioner.

C. CARTER LEE,
Attorney for Petitioner,
Rocky Mount, Virginia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 367

OTIS MASON MARTIN, CLAIMANT,
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vs.

UNITED STATES,
Respondent

BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Opinions of Court Below

The conclusions of the facts and the law by the District Court are set forth in R. p. 1; and the opinion of the Circuit Court of Appeals is set forth in R. p. 30.

Although the opinion of the Circuit Court of Appeals held in effect that:

> "There is no doubt that the Fourth Amendment protects all persons suspected or known to be offenders as well as the innocent, and it unquestionably extends not only to the persons but also to the houses of the people, whether they be residences or places of business . . . The Amendment applies in this case to Martin, a probationer and to his garage located near his home,

although his status is a circumstance to be taken into consideration;" . . .

Following the above statement, the Court sets forth the circumstances to be taken into consideration as to Martin's status as a probationer, and the decision of the Court confirms the judgment of the District Court. It would appear from the conclusions of law of the District Court, as well as the opinion of the Circuit Court of Appeals confirming the judgment of the District Court that serious consideration was given to the fact that Martin was on probation, and evidently, the circumstance that the officer making the search was a probation officer, and appellant was on probation, was the determining circumstance in the judgment of the court below.

Argument

The officer making the search had no warrant either for arrest or for search. Martin was not arrested, although he was known to the Probation Officer as the owner of the property.

The entry of the garage was made in the night time at from 5:45 to 6:00 A. M. on January 20, 1950, and by the officer opening the door of the garage without permission or request for admission. And the search was not made as an incident of an arrest.

Appellant does not question the right of the District Court to revoke his probation. The officer making the search had ample grounds to take Martin before the Court for violating his probation before the date of the search and seizure.

The evidence which justifies the revocation of a probation is a thing apart from that which is required for his conviction in the first place. The evidence is likewise different from that to justify the forfeiture of his property.

It is not necessary that a probationer commit a crime to forfeit his right of probation. It may be forfeited for such

reasons as his failure to make stated reports, or failure to avoid his former associates, or for failure to follow some useful occupation. The constructive purpose of probation is to encourage the probationer to rehabilitate himself, and his failure to make such effort is all that is required to effect the revocation.

But the fact that a man is on probation does not abridge any of the rights secured to him by the Fourth Amendment of the Constitution, nor his right to avail himself of any defense provided by the Bill of Rights as to any new crime.

May the requirements for a second conviction be less than in the first instance? Can the property of a probationer or convicted prisoner be subject to forfeiture with less requirements than that of a free man?

It will be observed from the opinion of the court below that the case of *Rabinowitz* v. *United States,* 339 U. S. 56, 65-6 was largely relied upon in its finding in the instant case. However, there are several wide distinctions between that and the case at bar; for example:

(1) In the *Rabinowitz* case, the officers were armed with a valid warrant of arrest; in the instant case, there was no arrest; and

(2) In the *Rabinowitz* case, the officers went to respondent's place of business, during business hours, a one room office open to the public, and to which the public, including the officers, were invited; in the instant case, the officer opened the door of the garage in the night time and entered the garage without invitation or request for admission thereto; and

(3) In the *Rabinowitz* case, the officers had positive information of the violation; in the instant case, the officer only suspected the new violation; and

(4) In the *Rabinowitz* case, the officers arrested Rabinowitz, and made the search as an incident of the arrest;

although Martin was present and known by the officer to be the owner of the garage and the automobile therein, no arrest was made prior to or after the search.

The learned Judge in the instant case said:

> "It is true that he did not take the offender into physical custody, but he obtained his promise to report to the Court the next day and he seized the automobile and the fruits of the crime." . . .
>
> "It may be doubtful whether these circumstances, coupled with the compliance of the probationer with the officer's notice to appear in court constituted an arrest within the technical meaning of the term;" . . .

While the Court below in its opinion said, "The Fourth Amendment applies in this case to Martin, a Probationer and to his garage—. . ." (R. p. 33).

But notwithstanding this fact, the Court held in effect that Probation Officer Fansler had authority without a warrant of any kind, and without permission or request for admission, to enter the garage of Martin in the night time and make a search and seizure therein without even an arrest, although Martin was present and known to be the owner of the premises and the items seized.

It is difficult to imagine any state of circumstances wherein the search could have been held to be unreasonable if the search in the instant case should be held to be a reasonable one. On the other hand, it is submitted that the search in the instant case was wholly unreasonable.

Admittedly, the actual use of force is not necessary to constitute an arrest; but the intention to arrest must be there, and must be evidenced by some unequivocal act, as by keeping the arrested person in sight, or in some way controlling his actions, or by use of words indicative of arrest. There can be no arrest without some restraint. Can it be that the mere telling an offender or requesting him to appear in court is tantamount to an arrest? Can a legal

summons or subpoena be served by some officer telling the party to come to court at a particular time? In this case, there was no restraint, and no arrest. The officer left the offender at liberty to go his own way.

The Supreme Court, in its wisdom, and within its prerogatives, promulgated admirable Federal Rules of Criminal Procedure, among which is Rule 41. This Rule, paragraph (c), gives specific directives concerning the issuance of search warrants and the execution and return of same. It provides among other things, that:

> "The warrant shall direct that it be served in the day time, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it shall be served at any time."

May an officer in the face of this Rule, and without positive knowledge, and without even a warrant for arrest, have greater power with respect to a search and seizure than that of an officer with a regular search warrant absent the positive affidavits?

We recognize that there are two schools of thought with respect to searches or seizures as applied to the Fourth Amendment; one of which would limit such searches to officers armed with a valid search warrant, or in case of only a warrant for arrest, to the search of the person arrested and seizure of visible things within reach; while the other school of thought would not so limit such searches where officers were armed with valid warrants of arrest, but enlarge such searches and seizures to include things or papers within the room, including desks and files, making such searches and seizures an incident to a valid arrest.

Both of these schools of thought are supported by eminent jurists, and by reasons equally cogent. But none of these authorities have favored exploratory searches, whether with or without a search warrant; nor has either

school of thought gone so far as to approve a search without a warrant of any kind, unless it be for most compelling reasons, such as the imminent danger of loss of life or limb; or disturbances of the peace, and even in this emergency, the rule is to first demand admission before making an entry into a building.

As the basis for a search, without a search warrant, there must be a lawful arrest. The right to enter the precincts of the home or curtilage of another should be incidental only to a lawful arrest, and not for the purpose of securing evidence upon which to justify an arrest.

It is significant that Officer Fansler, in effect, admitted that he entered the garage in this case, primarily to see what was in the car on the occasion of the search in question. See R. p. 20, where the following questions and answers were given:

> "Q. You came there for the purpose of seeing what was in the car?
> A. Primarily, yes sir, and to talk to Mr. Martin.
> Q. You did not knock on the door?
> A. No, sir.
> Q. You had no invitation.
> A. No, sir, I did not."

It is contended that if the search in the instant case had been made by any person other than a probation officer that the Court would have suppressed the evidence; and if Martin had been other than a probationer, the search would have been held illegal. It is contended therefore that neither the fact that the official making the search was a probation officer, nor the fact that Martin was a probationer should contravene the constitutional rights of appellant. It was not for the purpose of revoking the probation to which appellant objects; but the use of such evidence in the forfeiture proceeding, and for the new offense to which the appellant may be subjected.

The following authorities are relied upon in support of petition for Writ of Certiorari:

Agnello v. *United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145; *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153; *Gouled* v. *United States,* 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647; *Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367; *McDonald* v. *United States,* 333 U. S. 451, 69 S. Ct. 191; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319; *Taylor* v. *United States,* 286 U. S. 1, 52 S. Ct. 466; *United States* v. *Rabinowitz,* 70 S. Ct. 430; *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari, and thereafter reviewing and reversing said decision.

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